BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RHETT E. JAMISON	)	
Claimant	)	
VS.	)	
	)	
SEARS HOLDING CORP.	)	
Respondent	)	Docket No. 1,054,942
	)	
AND	)	
	)	
INDEMNITY INSURANCE COMPANY	)	
OF NORTH AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the August 10, 2012, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on December 14, 2012.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for claimant. Brent M. Johnston of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a November 15, 2010, accident. In the August 10, 2012, Award, ALJ Avery determined claimant has a 75% work disability and a 10% preexisting functional impairment. After applying the 10% preexisting impairment as a credit pursuant to K.S.A. 2010 Supp. 44-501(c), ALJ Avery reduced claimant's work disability to 65%. ALJ Avery awarded claimant temporary total and permanent partial disability benefits not to exceed $100,000.

Respondent contends claimant has a 15% preexisting whole body functional impairment, not 10% as found by the ALJ. Respondent also maintains the ALJ erred by not utilizing the method of calculating an employer's credit for claimant's preexisting impairment set out in *Payne*.[1] In its Application for Review, respondent listed nature and extent of claimant's impairment. However, respondent never addressed that in its brief to the Board nor at oral argument. Therefore, the Board deems that issue abandoned by respondent.

Claimant requests the Board affirm the ALJ's Award. Claimant submits the evidence supports a 10% preexisting functional impairment. Further, claimant argues the method of calculating the credit for claimant's preexisting functional impairment used in *Payne* does not apply in the instant case.

The issues before the Board on this appeal are:

1. What is claimant's preexisting functional impairment?

2. What is the correct method of calculating respondent's credit for claimant's preexisting functional impairment?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

The parties stipulated that claimant sustained a low back injury resulting from a series of repetitive accidents arising out of and in the course of his employment with respondent. It was also agreed by the parties that claimant's date of accident was November 15, 2010. Claimant worked at the Kmart Distribution Center for 30 years, picking up items, placing them in boxes and shipping them out. The boxes weighed 40 to

[1] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

50 pounds, depending on the size of the box. When claimant was switched to the 50-pound boxes, he began experiencing back symptoms.

Claimant underwent a discectomy at L5-S1 on the right on January 18, 2011, by Dr. Frank Holladay. The record indicates Dr. Holladay released claimant with a 30-pound lifting restriction. None of claimant's medical treatment records were placed into evidence. Claimant returned to work at the end of April 2011. Claimant worked until the end of June 2011, but was told by respondent to go home, because respondent could not accommodate his restrictions.

In 2007, claimant sustained a low back injury while working for Lawrence Sears Holding Corporation. Claimant underwent an L5-S1 discectomy on the right by Dr. Wesley E. Griffitt on April 26, 2007. Claimant returned to an accommodated job around July 4, 2007, and returned to his regular job duties a month later still honoring his restrictions.[2] In a letter dated November 13, 2007, to Sedgwick CMS, Dr. Griffitt, based upon the *Guides*,[3] assigned claimant a 10% whole person impairment.[4] Claimant settled his prior claim on May 8, 2008, based on a 15% functional impairment to the body as a whole. Dr. Griffitt's December 19, 2007, chart note was made part of the settlement record. In that note, the doctor stated, "I would rate his permanent impairment to the person as a whole for his low back problem and lumbosacral radiculopathy at 15 percent."[5] However, that note does not indicate whether the 15% whole body functional impairment was in accordance with the *Guides*.

At the request of his attorney, claimant was evaluated on October 18, 2011, by orthopedic physician Dr. Edward J. Prostic. Dr. Prostic's report indicated claimant had a previous work-related injury to the low back and underwent an L5-S1 discectomy on the right by Dr. Griffitt. Claimant had a good outcome and was restricted to lifting no more than 40 pounds, which was later raised to 50 pounds. According to Dr. Prostic, Dr. Griffitt initially assigned claimant a 10% functional impairment, but five weeks later, on December 19, 2007, Dr. Griffitt increased claimant's functional impairment to 15%. Dr. Prostic indicated that he could not tell from Dr. Griffitt's December 19, 2007, notes if the 15% functional impairment Dr. Griffitt assigned claimant conformed with the *Guides*. Dr. Prostic

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[2] R.H. Trans., Resp. Ex. B at 6-7.

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] Bieri Depo., Ex. 3.

[5] R.H. Trans., Resp. Ex. B at 22.

testified that using the DRE model in the *Guides*, he would have assigned claimant a 10% functional impairment after his 2007 injury.[6]

Dr. Prostic testified claimant now has a 25% functional impairment, with 10% from the 2007 injury and 15% from the 2010 injury. Dr. Prostic used the range of motion model in the *Guides* to determine claimant's functional impairment. Dr. Prostic did so because subsequent publications of the American Medical Association explain that the range of motion model should be used when there is a repetitive injury or a recurrent injury to the same area. However, Dr. Prostic acknowledged the *Guides* does not give such directions. He also testified the DRE model could not be used as it is accurate for a single injury event in a previously normal area, not in a case such as this.[7] Dr. Prostic testified the range of motion model is used when an injured employee does not fit neatly into one of the DRE categories.

Dr. Prostic restricted claimant to occasionally lifting no more than 30 pounds, knee to chest, and half that amount frequently. He indicated claimant should minimize activities below knee level or above shoulder height. Dr. Prostic also stated claimant needed to avoid frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment, and captive positioning. Based on a list of job tasks claimant performed in the 15 years before his accident prepared by vocational expert Dick Santner, Dr. Prostic opined claimant could no longer perform 4 of 10 tasks for a 40% task loss.

Pursuant to an order issued by ALJ Avery, claimant underwent an independent medical examination by Dr. Peter V. Bieri on January 24, 2012. Dr. Bieri was directed to provide a disability rating and make recommendations on what future medical treatment was appropriate, if any. Dr. Bieri was also instructed to impose appropriate restrictions and render opinions concerning apportionment of any preexisting impairment of the affected body parts and task loss, if any. Dr. Bieri opined claimant qualified for a 2% functional impairment for the second operation at the same level and a 9% functional impairment for range of motion deficits of the lumbar spine. The two ratings combined for an 11% whole body functional impairment. Dr. Bieri testified that combining claimant's 15% preexisting functional impairment with the 11% functional impairment resulting from the 2010 accident resulted in a 24% functional impairment.

When asked what claimant's ratings would be if the DRE method were used, Dr. Bieri testified that when he examined claimant in January 2012, claimant would have a 20% functional impairment and would be in DRE Category IV, with a preexisting

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[6] Prostic Depo. at 17.

[7] *Id.*, at 21-22.

functional impairment between 10% and 15%.[8] However, Dr. Bieri admitted that if the DRE model were used, there is no 15% functional impairment for the lumbosacral spine under the *Guides*. Later in his testimony, Dr. Bieri opined claimant had a 10% preexisting functional impairment for his low back and lumbosacral radiculopathy.

Dr. Bieri agreed with Dr. Holladay's restriction that claimant lift no more than 30 pounds. Using Mr. Santner's task list, Dr. Bieri opined claimant could no longer perform 6 of 10 tasks for a 60% task loss.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2010 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In *Hanson*,[9] the Kansas Court of Appeals stated:

> The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.

In *Kirker*,[10] the Kansas Court of Appeals stated:

> For an award to be reduced by an amount of preexisting functional impairment, the current injury must constitute an aggravation of the preexisting condition. *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 379, 102 P.3d 1169 (2004). Once it is established that the current injury is an aggravation of the preexisting injury, the respondent has the burden of proving the amount of preexisting impairment to be deducted. *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 95, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001). This determination must be based upon the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1995). K.S.A. 44-510d(a)(23); *Criswell v. U.S.D. 497*, No. 104,517, 2011 WL

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[8] Bieri Depo. at 12-13.

[9] *Hanson v. Logan U.S.D. 326,* 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[10] *Kirker v. Bob Bergkamp Construction Co., Inc.*, No. 107,058, 2012 WL 4937471 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012).

5526549, at *6-*7 (Kan. App. November 10, 2011) (unpublished opinion), *pet. for rev. filed* December 9, 2011[, *rev. denied* February 4, 2013].

Respondent asserted that claimant had a 15% preexisting whole body functional impairment, not 10% as the ALJ found. Respondent bases this assertion on the fact claimant settled his prior back injury claim based upon a 15% functional impairment. In *Baxter*,[11] the Kansas Supreme Court stated, "Prior settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury."

Dr. Griffitt initially gave claimant a 10% functional impairment for his 2007 back injury, but later increased the functional impairment to 15%. However, Dr. Griffitt did not indicate the 15% rating was in accordance with the *Guides*. Dr. Bieri testified that he thought Dr. Griffitt was giving a rating for claimant's low back injury and a separate rating for radiculopathy. Dr. Bieri indicated that after claimant's 2007 accident, using the DRE method in the *Guides*, claimant likely had a 10% whole body functional impairment. Dr. Prostic also would have given claimant a 10% whole body functional impairment for his 2007 back injury using the *Guides* as required by K.S.A. 44-510e. The Board finds that claimant had a 10% preexisting functional impairment for his low back.

Respondent asserts that all credits for a preexisting functional impairment should be calculated in accordance with *Payne*.[12] In *Payne*, the employer did not contest the finding that Payne was permanently and totally disabled, but requested a credit for a preexisting 35% functional impairment. The ALJ found that Payne's award for permanent total disability should be reduced under K.S.A. 44-501(c) because of her 35% preexisting functional impairment. The ALJ first calculated the number of weeks of disability payments Payne would be entitled to with a 35% functional impairment. The ALJ then calculated the number of weeks it would take for Payne to receive the maximum award of $125,000.00 for being permanently and totally disabled. To calculate the final award, the ALJ deducted the number of weeks for the preexisting functional impairment from the number of weeks it would take Payne to receive her maximum award of $125,000.00. The Board affirmed, as did the Kansas Court of Appeals.

It is significant that *Payne* involved a claim for permanent total disability. Where a claimant had a preexisting functional impairment and sustains a work disability following a subsequent compensable injury, the Board has used a different method to calculate the

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[11] *Baxter v. L. T. Walls Constr. Co.*, 241 Kan. 588, 593, 738 P.2d 445 (1987).

[12] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

credit. In *Gethins*,[13] the Board determined claimant had a 37% wage loss and a 55% task loss for a 46% work disability. Gethins had an 8% preexisting functional impairment for a back condition. The Board reduced claimant's work disability to 38% by subtracting claimant's 8% preexisting functional impairment from claimant's 46% work disability. Gethins objected. The Kansas Court of Appeals affirmed and stated:

> Its [Board's] opinion was based on American Medical Association guidelines and provides an adequate basis to affirm the Board's determination that claimant had an 8% preexisting impairment. Additionally, there is substantial competent evidence to affirm the Board's decision to reduce claimant's permanent partial general disability award by 8% due to her preexisting impairment.[14]

However, neither party nor the Board are aware of any appellate cases where a party has challenged the method of calculating how a credit for a preexisting functional impairment shall be deducted from a permanent partial disability award based upon a work disability. Typically, the issue before the Board and appellate courts is whether respondent proved by a preponderance of the evidence that claimant had a preexisting functional impairment in accordance with the *Guides*.

At oral argument, respondent put forth several arguments as to why the credit for a preexisting functional impairment should be calculated using the method in *Payne*. First, respondent asserts K.S.A. 2010 Supp. 44-501(c) prescribes only one method of calculating a preexisting credit. It contends one method of calculating how a preexisting functional impairment is deducted should be applied in all types of claims. Respondent suggests that in *Payne*, the appellate courts adopted the one method that is to be used when there is a credit for a preexisting functional impairment. Thus, according to respondent, where an employee has a preexisting functional impairment of 10%, that figure would be multiplied times 415 weeks resulting in a 41.5-week deduction. Then, 41.5 weeks would be deducted from the total number of weeks of benefits claimant is awarded.

K.S.A. 2010 Supp. 44-501(c) provides that an award of compensation shall be reduced by the amount of an injured worker's preexisting functional impairment. However, the Kansas Legislature did not specify a particular method of calculating that reduction, or that a single method of calculation must be used in every claim where there is a preexisting

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[13] *Gethins v. Cedar Living Center,* No. 90,129, 2004 WL 1245613 (Kansas Court of Appeals unpublished opinion filed June 4, 2004).

[14] *Id.* This methodology was also applied in *Criswell v. U.S.D. 497*, No. 104,517, 2011 WL 5526549, (Kansas Court of Appeals unpublished opinion filed Nov. 10, 2011), *rev. denied* (Feb. 4, 2013).

functional impairment. The Board has consistently used the same method of calculating the reduction adopted by ALJ Avery.[15]

Respondent contends that if the *Payne* method was used, 41.5 weeks should be deducted from 202.14 weeks rather than from 298.86 weeks as the ALJ suggested in a footnote on page 4 of the Award. Respondent suggests 202.14 weeks be used, as $100,000 divided by claimant's weekly benefit rate of $494.69 equals 202.14 weeks. The ALJ used 298.86 weeks as 398.49 weeks (415 weeks minus 16.51 weeks (the 16.51 weeks is 31.51 weeks of temporary total disability minus the first 15 weeks)) multiplied by claimant's 75% work disability equals 298.86 weeks.

Respondent argues that using the ALJ's method of calculation gives an employee with a work disability more compensation benefits than an employee who is permanently and totally disabled. Respondent asserts this is against public policy. However, using the *Payne* method of calculating a credit would result in unfairly penalizing injured workers who earn a higher rate of pay. For example, an individual who is entitled to the maximum benefit rate of $545 per week would be paid his or her $100,000 work disability benefits over 183.49 weeks. If a deduction of 41.5 weeks (or 10%) is made, the injured worker would be entitled to 141.99 weeks which amounts to $77,384.55. A second injured worker who is entitled to $400 per week in compensation would be paid his or her $100,000 over 250 weeks. If a deduction of 41.5 weeks (or 10%) is made, the second injured worker would be entitled to 208.5 weeks which amounts to $83,400.

Respondent's final argument is based upon the language of K.S.A. 44-510f(a), which in part says:

> Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
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> . . . .
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> (3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $100,000 for an injury or any aggravation thereof; . . .

Respondent asserts claimant's temporary total and permanent partial disability payments for his 2007 low back injury and 2010 aggravation are limited to $100,000. Respondent asserts claimant sustained his 2007 back injury and then aggravated it in 2010 while working at the same job in the same location for the same employer. Stated another

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[15] *Bell v. Integrated Health Services*, No. 1,005,394, 2005 WL 831909 (Kan. WCAB Mar. 30, 2005); *Magallanes v. Tyson Fresh Meats, Inc.*, No. 1,028,194, 2012 WL 5461451 (Kan. WCAB Oct. 26, 2012).

way, the 2007 temporary total disability and permanent partial disability payments would be subtracted from $100,000, and claimant's recovery for the 2010 back injury would be limited to the difference.

The Board disagrees with respondent on this issue. K.S.A. 44-510f(a) imposes a maximum of $100,000 that an employer must pay a claimant for a single injury or aggravation. This issue was addressed by the Board in *Boyer*.[16] Boyer settled 1981, 1989 and 1994 claims for back injuries. The 1989 and 1994 claims were against Binney & Smith. Boyer sustained a fourth back injury in 1997, also while working for Binney & Smith, and was found to be permanently and totally disabled. It was determined that as a result of the 1997 accident, Boyer had aggravated his preexisting back injury. Respondent argued the amounts Boyer received in his previous settlements should be credited against the $125,000 maximum provided for in K.S.A. 44-510f. The ALJ agreed, but the Board reversed for several reasons, stating:

> The Board has reached a different conclusion for two reasons. First, the Board does not construe the statute as respondent urges. The Board understands the statute to mean that a claimant may not receive more than $125,000 for an injury and may not receive more than $125,000 for an aggravation of an injury. In either case, the limit is the same. This conclusion is, we believe, supported by case law holding that an aggravation of a preexisting condition is fully compensable. *Poehlman v. Leydig*, 194 Kan. 649, 400 P.2d 724 (1965); *Baxter v. L. T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987). The Board also considers the language of the statute to be supportive of this conclusion. The statute could have clearly limited the total amount for injury to a single part of the body by stating that the limit applies to any injury including any aggravation of that initial injury or could have stated that the limit applies to an injury and the aggravation of that injury. By using "or" the legislature suggested that the limit applies to either an injury or an aggravation of an injury. The Board also notes, as further support for its reading of this statute, that reduction for prior injury is expressly governed by K.S.A. 44-501(c) and 44-510a.
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> Second, if the term "aggravation" is intended in K.S.A. 44-510f as a limit on the total award from the initial injury and any aggravation of that injury, the Board does not consider claimant's injury to be an aggravation. If the term "aggravation" is there limiting the total for both the injury and the aggravation, the Board believes the term "aggravation" should be construed as further injury that is the direct and natural consequence of the first injury, not injury from new and distinct trauma. This distinction is made in *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. App. *[sic]* 800 (1982) to determine whether the second injury could be the subject of a liability claim. In the second accident

[16] *Boyer v. Binney & Smith, Inc.*, No. 228,897, 2000 WL 759338 (Kan. WCAB May 31, 2000).

> claimant slipped, caught himself, and broke the fusion for the initial compensable injury. . . .[17]

CONCLUSION

1. Claimant had a 10% preexisting functional impairment to the body as a whole as a result of his 2007 back injury.

2. ALJ Avery used the correct method of calculating respondent's credit for claimant's 10% preexisting functional impairment. However, ALJ Avery mistakenly awarded claimant temporary total disability and permanent partial disability payments simultaneously. A claimant cannot be temporarily totally disabled and permanently partially disabled during the same time period.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[18] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the August 10, 2012, Award entered by ALJ Avery as follows:

Rhett E. Jamison is granted compensation from Sears Holding Corp. and its insurance carrier for a November 15, 2010, accident and resulting disability. Based upon an average weekly wage of $742.00, Mr. Jamison is entitled to receive 31.51 weeks of temporary total disability benefits at $494.69 per week, or $15,591.22, followed by 170.63 weeks of permanent partial disability benefits at $494.69 per week, or $84,408.78, for a 65% permanent partial general disability and a total award not to exceed $100,000.00.

As of March 5, 2013, Mr. Jamison is entitled to receive 31.51 weeks of temporary total disability benefits at $494.69 per week in the sum of $15,591.22, followed by 88.57 weeks of permanent partial disability benefits at $494.69 per week in the sum of $43,814.69, for a total due and owing of $59,405.91, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $40,594.09 shall be paid at $494.69 per week until paid or until further order of the Director.

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[17] *Id.*

[18] K.S.A. 2011 Supp. 44-555c(k).

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
georgepearsonlaw@sbcglobal.net; dfloyd.georgepearsonlaw@yahoo.com

Clifford K. Stubbs and Brent M. Johnston, Attorneys for Respondent and its Insurance Carrier
cstubbs@mvplaw.com; bjohnston@mvplaw.com; mvpkc@mvplaw.com

Brad E. Avery, Administrative Law Judge